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By Facsimile and First Class U.S. Mail
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Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, DC 20551

Re: Prohibition of Funding of Unlawful Internet Gambling, Docket No. R-1298

Dear Ms. Johnson:

Wells Fargo & Company (NYSE: WFC) is a diversified financial services company providing banking, insurance, investments, mortgage, and consumer finance to nearly 11 million households and 23 million customers through 5,928 banking offices, the Internet ("wellsfargo.com"), and other distribution channels throughout North America, including all 50 states, and the international marketplace. Wells Fargo & Company has over $549 billion in assets and 158,800 employees, as of September 30, 2007. Wells Fargo & Company ranked fifth in assets and fourth in market value of its stock among its peers as of such date. Wells Fargo & Company is the 25th largest private employer in the United States. Wells Fargo & Company has the highest possible credit rating, "Aaa," from Moody's Investors Service and the highest credit rating given to a U.S. bank, "AA+," Standard and Poor's Ratings Services.

Wells Fargo & Company is pleased to submit its comments on the captioned matter. The comments below relate primarily to the payment activities of Wells Fargo & Company's principal banking subsidiary, Wells Fargo Bank, National Association ("Wells Fargo").

I. Background. On October 4, 2007, the Board of Governors of the Federal Reserve System and The Departmental Offices of the Department of the Treasury (collectively, the "Agencies") published a notice of joint proposed rule making and request for comment in the Federal Register[1] (the "Proposal" or "proposed regulations," as applicable) to implement

[1] Prohibition on Funding of Unlawful Internet Gambling, 72 Fed.Reg. 56680 (proposed October 4, 2007), to be codified at 12 C.F.R. Part 233 and 31 C.F.R. Part 132.

applicable provisions of the Unlawful Internet Gambling Enforcement Act of 2006[2] (the "Act"). As required under the Act, the Proposal designates certain payment systems that could be used in connection with unlawful Internet gambling transactions prohibited under the Act. The Proposal requires participants in designated payment systems to establish policies and procedures reasonably designed to identify and block or otherwise prevent or prohibit transactions in connection with unlawful Internet gambling. The Proposal also grants exemptions to certain participants in designated payment systems from the requirements to establish such policies and procedures because the Agencies believe that it is not reasonably practical for those exempted participants to identify and block, or otherwise prevent or prohibit, unlawful Internet gambling transactions restricted by the Act. Finally, the Proposal describes the types of policies and procedures that nonexempt participants in each class of designated payment systems may adopt in order to comply with the Act, including nonexclusive examples of policies and procedures which would be deemed to be reasonably designed to prevent or prohibit unlawful Internet gambling transactions proscribed by the Act.

II. Wells Fargo's comments specifically solicited under the Proposal. We respectfully offer the following comments relative to the Proposal. In submitting our comments, we shall initially address in the order set forth therein those subjects for which the Agencies solicits specific comments therein.

A. Six month implementation period. The Agencies propose that final regulations take effect six months after the joint final rules are published.[3] The Agencies ask whether this six-month period is reasonable. In that regard, the Agencies request that commenters supporting a shorter period should explain the reasons they believe payment system participants would be able to modify their policies and procedures, as required, in the shorter period. Conversely, the Agencies ask that commenters requesting a longer period should explain the reasons the longer period would be necessary to comply with the final regulations, particularly if the need for additional time is based on any system or software changes required to comply with the final regulations.

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[2] Pub.L.No. 109-347, 120 Stat. 1884 (codified at 31 U.S.C. §§ 5361-5367). The Act was signed into law on October 13, 2006.

[3] 72 Fed.Reg. at 56682.

We object to the proposed six-month implementation period. We provide our reasoning to this objection, as follows:

- Subsection __.5(a) of the proposed regulations expressly requires all nonexempt participants in the designated payment systems to establish and implement policies and procedures in order to identify and block, or otherwise prevent or prohibit, restricted transactions. In accordance with the Act,[4] § __.5(b) provides that a participant in a designated payment system shall be considered in compliance with this requirement if the designated payment system of which it is a participant has established policies and procedures to identify and block, or otherwise prevent or prohibit, restricted transactions and the participant relies on, and complies with, such policies and procedures.[5] As a practical matter, based on our experience in dealing with multiple regional and national payment systems the designated payment systems will not be able to issue such policies and procedures until the final regulations are published by the Agencies. Even after the designated payment systems issue such policies and procedures, participants in such designated payment systems will require a reasonable period of time after the finalization of the designated payment system's policies and procedures to adopt and implement a process to conform to such policies and procedures. While the practice of payment systems may vary, many of these payment systems may issue for comment by participants in the systems proposed policies and procedures under the final regulations. In response to comments, the policies and procedures may be redrawn or amended thereafter. Based on these observations, the issuance of policies and procedures by payment systems, such as local and national clearing houses, involves a considerable amount of time and effort. Further, in order for participants to exploit this compliance safe harbor, participants themselves will require additional time to develop and issue their own process to conform to such policies and procedures, especially for those participants having significant, complex regional or national operations, such as ourselves.

[4] 31 U.S.C. § 5364(c).
[5] 72 Fed.Reg. at 56697-56698.

- In connection with the foregoing, the final regulations should anticipate that policies and procedures issued by designated payment systems will be amended or modified from time to time. For those participants relying in good faith on such policies and procedures for the compliance safe harbor, the final regulations should grant a commercially reasonable period of time for participants to conform their policies and procedures to such amendments or modifications. During such amendment or modification period, the participants should continue to enjoy the compliance safe harbor granted under § __.5(b).
- We are unclear as to whether the final regulations to be issued by the Agencies under the Act will apply to existing customers as of the effective date of the final regulations. If the Agencies contemplate the application of the final regulations to existing customers, participants will require a significant period of time to implement the final regulations. Due diligence would need to be undertaken as to existing customers to confirm their activities. Agreements with existing customers would have to be amended to incorporate provisions advanced in the Proposal. For example, under § __.6(c)(1)(ii), the proposed regulations set forth examples of policies and procedures reasonably designed to prevent or prohibit restricted transactions in card systems. In this regard, the proposed regulations provide that such policies and procedures are deemed to be so reasonably designed if they include as a term of the merchant customer agreement that the merchant may not receive restricted transactions through the card system. Wells Fargo has a significant number of merchant customers, totaling currently in the low six figures. If Wells Fargo seeks to provide such a provision prohibiting the receipt of restricted transactions in the merchant customer agreement as to existing merchant customers, it would face a significant administrative and operational challenge timely amending existing agreements, if the final regulations were applied retroactively.

Based on the foregoing, we urge a longer period to comply with the final regulations. The enhancements to our systems and software will be highlighted below as we respond to the specific comments solicited in the Proposal. Further, the training and educating of our bankers to implement the new policies and procedures and to operate the enhanced systems will require

additional time, as we have numerous lines of business and products and services that will be directly impacted by these mandated policies and procedures. Additionally, to the extent we wish to rely on the compliance safe harbor through relying on, and complying with, the policies and procedures of designated payment systems, the process to conform to such policies and procedures will require significant time to develop and issue.

Accordingly, we strongly recommend the final regulations take effect no less than 24 months after they are published.

B. The terms and definitions. The Agencies request comment on all of the terms and definitions set forth in the Proposal.[6] In particular, the Agencies seek comment on any term used in the Proposal that a commenter believes are not sufficiently understood or defined.

One of the core deficiencies in the Proposal is the failure to define clearly the meaning of the term "unlawful Internet gambling."[7] In the Proposal, this term is defined as placing, receiving, or transmitting a bet or wager by means that involves the use of the Internet "where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received or otherwise made."[8]

The Agencies apparently did not refine this definition because

> [t]he Act focuses on payment transactions and relies on prohibitions on gambling contained in other statutes .... Further, application of some of the terms used in the Act may depend significantly on the facts of specific transactions and could vary according to the location of the particular parties to the transaction based on other factors unique to an individual transaction.[9]

Due to the absence of a clear meaning to this key term under both the Act and the Proposal, financial institutions are required at their peril to determine unilaterally which state or federal laws governing gambling apply to a particular transaction or a set of transactions. This undertaking may be challenging and burdensome to financial institutions attempting in good faith to conform to the final regulations.

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[6] 72 Fed.Reg. at 56683.
[7] 72. Fed. Reg. at 56697; § __.2(t).
[8] *Ibid.*
[9] 72 Fed.Reg. at 56682.

For instance, under the California Penal Code, a raffle ticket may not be sold, traded, or redeemed over the Internet.[10] However, if a purchaser of a raffle ticket online is located physically in a remote jurisdiction outside of California where the purchase of raffle tickets online is lawful, a financial institution may be unable to differentiate "reasonably"[11] as a practical matter between lawful and unlawful transactions, particularly by automated means, given the volume of transactions a financial institution may process. Thus, e.g., a financial institution may at its peril improperly block an online raffle ticket sale transaction by a seller located in California because the purchaser is located in a venue where such raffle ticket sale is lawful (assuming that the laws of that venue govern the transaction). This challenge is further compounded by the Proposal providing it is not intended to restrict lawful gambling activities.[12]

This transaction identification difficulty is further increased by the challenge the financial institutions confront in identifying the businesses themselves engaged in apparently unlawful Internet gambling. Certainly, the Agencies openly acknowledge this difficulty by electing not to provide a list of such unlawful Internet gambling businesses due to "significant investigation and legal analysis."[13] Presumably, the financial institutions are saddled with the burden of undertaking such significant investigation and legal analysis.

Further, the Proposal notes that (as detailed above) "such analysis could be complicated by the fact that the legality of a particular Internet transaction might change depending on the location of the gambler at the time the transaction was initiated, and the location where the bet or wager was received."[14]

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[10] California Penal Code § 320.5(f) provides:

> (f) No raffle otherwise permitted under this section may be conducted, nor may tickets for a raffle be sold, within an operating satellite wagering facility or racetrack enclosure licensed pursuant to the Horse Racing Law (Chapter 4 (commencing with Section 19400) of Division 8 of the Business and Professions Code) or within a gambling establishment licensed pursuant to the Gambling Control Act (Chapter 5 (commencing with Section 19800) of Division 8 of the Business and Professions Code). A raffle may not be advertised, operated, or conducted in any manner over the Internet, nor may raffle tickets be sold, traded, or redeemed over the Internet. For purposes of this section, advertisement shall not be defined to include the announcement of a raffle on the Web site of the organization responsible for conducting the raffle. (Emphasis supplied.)

[11] See § __.5(c) of the Proposal, 72 Fed.Reg. at 56697: "Such person reasonably believes the transaction to be a restricted transaction; ...."

[12] See § __.5(d) of the Proposal, 72 Fed.Reg. at 56698.

[13] 72 Fed.Reg. at 56690.

[14] *Ibid.*

To further make this identification of the unlawful enterprise more difficult, a business may have both unlawful activities proscribed by the Act and lawful activities not proscribed by the Act. A gaming business may operate a lawful restaurant or gift shop. A payment through a designated payment system may be intended for the lawful line of business. Through the course of time, a business may also change its activities. Formerly lawful activities may evolve into unlawful activities.

We regret that we cannot offer at this stage any further input on the inherent ambiguity of the term "unlawful Internet gambling," except to note that this is a highly problematical shortcoming in the Proposal. We comment below further on this issue, specifically to the development of a list.

In regard further to the definitions in the Proposal, while not specifically defined, we are troubled by the repeated use of the term "block" therein. This term is unclear. Do the Agencies suggest that a participant has an obligation to "freeze" accounts and perhaps even to debit accounts involved in restricted transactions through the selection of this term in the Proposal? We suggest that the term "block" be struck so that, where applicable, the following is set forth in the final rules: "policies and procedures to identify and prevent or prohibit restricted transactions ...."

C. List of designated payment systems. The Agencies request comment on whether the list of designated payment systems in the Proposal is too broad or narrow. Particularly, the Agencies request comment on whether nontraditional or emerging payments systems could be used in connection with, or to facilitate, any restricted Internet transaction. In the event a commenter believes that such a payment system should be so designated in the final rule, the commenter should prescribe policies and procedures that might be reasonably designed to identify and block, or otherwise prevent or prohibit, restricted transactions through that system.[15]

Firstly, we believe that the designated payment systems are too broad. We recommend that the Agencies exclude the Automated Clearing House ("ACH") system (at least as to domestic ACH transactions), the check collection system, and the wire transfer system categorically as designated payment systems under the Proposal. While we are mindful that the Agencies may

[15] 72 Fed.Reg. at 56685.

have some reservations about excluding these three payment systems from coverage, let us generally explore the merits we have identified for this position.

Currently, the state of the technological art supporting these three payment systems is such that apparent restricted transactions may not be identified by automated means (even if we can achieve an understanding of the meaning of this term "restricted transactions"). Because we cannot by automated means identify restricted transactions, we will in all likelihood identify customers engaged in risky behavior related to restricted transactions (e.g., gambling businesses generally) and block or prevent many transactions benefiting such customers, regardless of the lawful or unlawful nature of the underlying behavior causing the transactions to originate. In short, the compliance efforts under the final regulations will likely be largely customer-centered rather than transaction-centered. When the compliance effort focuses on the customer vis-à-vis the transaction, one significant, unintended consequence will be the limiting or closing of access to these payment systems to many businesses engaged in lawful activity merely because such businesses may be viewed by financial institutions as engaged in activities that are deemed "risky." Due to such activities, financial institutions will approach such businesses with an enhanced or elevated sense of risk, resulting in the creation of an unbanked or underbanked population of businesses currently enjoying unencumbered access to these payment systems through financial institutions. The Act clearly did not intend this result.[16]

Further to this analysis advocating the exclusion of such payment systems, let us delve into the ACH payment system to highlight this view. The Proposal grants an exemption from the proposed regulation's requirements for the ACH system operator, the originating depository financial institution ("ODFI") in an ACH credit transaction, and the receiving financial depository institution ("RDFI") in an ACH debit transaction (except with respect to certain cross-border transactions).[17] The Proposal does not exempt the financial institution serving as the ODFI in an ACH debit transaction or the RDFI serving in an ACH credit transaction because the Proposal advances an excessively sanguine thesis: these institutions typically have a pre-existing relationship with the customer receiving the proceeds of the ACH transaction, and could, with reasonable due diligence, take steps to ascertain the nature of the customer's business

[16] See 31 U.S.C. § 5364(b)(4).
[17] 72 Fed.Reg. at 56686.

and ensure that the customer relationship is not used to receive the proceeds of restricted transactions.

Our comment is directed to one of the key, core flaws in the Proposal, as initially observed above, a flaw adversely impacting the three payment systems for which we seek exclusion. (The following comment could apply to other requirements under the Proposal.) While state or federal laws may provide some guidance on the nature of unlawful Internet gambling activities, financial institutions may have great difficulty in identifying whether a particular customer is engaged in such unlawful activities. (This difficulty is compounded by the sheer volume of transactions we process daily.[18])

This difficulty financial institutions face is made plain by footnote number one to the Proposal.[19]

The Act grants exemptions to three general categories of transactions:

- Intrastate transactions (a bet or wager made exclusively within a single state, whose state law or regulation contains certain safeguards regarding such transactions and expressly authorizes the bet or wager and the method by which the bet or wager is made, and which does not violate any provision of applicable federal gaming statutes).
- Intratribal transactions (a bet or wager made exclusively within the Indian lands of a single Indian tribe or between the Indian lands of two or more Indian tribes as authorized by federal law, if the bet or wager and the method by which the bet or wager is made is expressly authorized by and complies with applicable Tribal ordinance or resolution (and Tribal-State Compact, if applicable) and includes certain safeguards regarding such transaction, and if the bet or wager does not violate applicable federal gaming statutes).
- Interstate horseracing transactions (any activity that is allowed under the Interstate Horseracing Act of 1978, 15 U.S.C. § 3001 *et seq.*). This last category of exempt transactions is particularly interesting because while this population of transactions is excluded under the Act, even an agency within the federal government takes issue with this exclusion. The U.S. Department of Justice has consistently taken the position that the interstate transmission of bets and wagers, including bets and wagers on horse races,

[18] For example, we process between 12 million 14 million checks per business day.
[19] 72 Fed.Reg. at 56681.

violates federal law and that the Interstate Horseracing Act did not alter or amend the federal criminal statutes prohibiting such transmission of bets and wagers. Not surprisingly, the horse racing industry disagrees with this position. Apparently mindful of this disagreement, Congress failed to take an unequivocal position on this issue under the Act, leaving this question to be addressed separately through the exemption granted thereunder.

Given the scope and nature of the three exemptions granted expressly under the Act and given the uncertainty associated with the definition of "unlawful Internet gambling," a financial institution endeavoring in good faith to identify restricted activities under the Act faces insurmountable administrative, operational, and systemic challenges, particularly in an ACH transaction. When an ODFI originates numerous ACH debit entries daily, identifying and blocking restricted transactions and identifying exempt transactions can become virtually impossible, especially in the current absence of merchant or business coded identifiers by class. As a practical matter, how can an ODFI in an ACH debit transaction, for example, differentiate between an exempt intrastate bet or wager and an unlawful interstate bet or wager (assuming that the ODFI can even identify an unlawful, restricted bet or wager)? An RDFI in an ACH credit transaction confronts similar challenges in determining the nature of the business activities of the recipient of the proceeds of the ACH transaction, particularly by automated means, given the volume of ACH transactions generally. This identification challenge is further compounded when even Congress fails to provide clear guidance on the subject of bets and wagers on horse races, electing to categorically exempt those falling within the Interstate Horseracing Act of 1978. The compliance undertakings are undermined by the difficulty in identifying these restricted transactions, particularly identification by automated means.

Secondly, as to wire transfer transactions, we confront a unique challenge in applying the proposed regulations: the Agencies provide an exemption from the proposed regulation's requirements for the originator's bank (i.e., the depositary bank sending the wire transfer on behalf of the gambler) and intermediary banks (other than the bank that sends the transfers to a foreign respondent bank). In this connection, the appropriate classification of drawdown requests comes into play. In a drawdown request, we may send to another bank to debit an

account at that bank and wire transfer to us a sum certain.[20] In that case, are we the originator's bank for purposes of the proposed regulation, or is the bank sending the wire transfer in response to our drawdown request the originator's bank? By virtue of the receipt of the proceeds of the wire transfer, do we become the beneficiary's bank?

Conversely, if we receive a drawdown request from another bank to debit a customer's account and wire transfer a sum certain to the requesting bank, are we the originator's bank, or is the bank requesting the wire transfer the originator's bank? Again, by virtue of the receipt of the proceeds of the wire transfer, does the bank originating the drawdown request become the beneficiary's bank? We would appreciate a clarification on this point.

Thirdly, as a matter of process, in the event the Agencies do not comply with our request by reducing the number of payment systems and, indeed, elect to add new payment systems, we strongly recommend the following. If the Agencies entertain adding additional designated payment systems under the final regulations subsequent to their publication, the Agencies ought to provide notice and afford an opportunity to the public to comment thereon similarly to the manner in which the final regulations hereunder will be issued. This process will afford those possibly impacted by the addition of a new designated payment system to voice views on the proposal prior to the adoption of final regulations.

D. Exemptions. The Agencies request comment on all aspects of the exemptions, but in particular whether the exemptions for certain participants in the ACH systems, check collection systems, and wire transfer systems discussed in detail in the Proposal are appropriate.[21]

Let us explore check collection systems. If a U.S. domestic bank receives a check for collection directly from a foreign bank, that U.S. domestic bank is deemed a depositary bank for purposes of the proposed regulations.[22] As noted above, participants will encounter significant difficulty in identifying restricted transactions.[23] We strongly suspect that foreign banks will similarly encounter such difficulty, if not more so. This difficulty will be further compounded by the observation that some forms of gambling are lawful and permissible in certain foreign nations. Wells Fargo has a correspondent relationship with a significant number of foreign

[20] Fedwire type 1031 and SWIFT MT 101.
[21] 72 Fed.Reg. at 56686.
[22] 72 Fed.Reg. at 56699.
[23] The Agencies acknowledge such difficulty. 72 Fed.Reg. at 56690.

banks. The Agencies can appreciate the complex challenges those foreign banks may face in endeavoring to come to terms with the requirements under the Proposal at our behest. Each and every such bank must inventory the gambling laws within its jurisdiction and render a determination on the lawfulness and unlawfulness of its customer's behavior (presumably under advice of counsel) in light of such laws. (Presumably, in this regard, the jurisdiction where the transaction originates, if that jurisdiction is outside the jurisdiction of the domicile of the foreign bank, may also have an impact on that analysis, as it does herein.) Merely providing a term in the agreement between a U.S. domestic bank and a foreign correspondent bank requiring the foreign bank to have reasonably designed policies and procedures in place to ensure that the correspondent relationship will not be used to process restricted transactions is plainly insufficient, especially if Wells Fargo must explain this new requirement to long standing foreign correspondent relationships. Accordingly, we suggest that check collection transactions on behalf of foreign banks be excluded from the final regulations, if the Agencies elect not to exclude the check collection system categorically.

E. ODFI in an ACH credit transaction. The Agencies specifically request comment on whether it is reasonably practical to implement policies and procedures (including, but not limited to, those discussed in the Proposal) for an ODFI in an ACH credit transaction, whether such policies and procedures would likely be effective in identifying and blocking restricted transactions, and whether the burden imposed by such policies and procedures on an originator and an ODFI would outweigh any value provided in preventing restricted transactions and a description of such burdens and benefits.[24]

We have addressed this inquiry previously above. Again, we encourage the Agencies to entertain excluding all ACH transactions from coverage under the Proposal (in addition to the check collection system and the wire transfer system).

We additionally point out that the Agencies appear to be using two standards when a financial institution is alerted to a restricted transaction. Under proposed § __.6(b)(1)(ii), a financial institution is required to have procedures to be followed with respect to a customer if as an ODFI or a third party sender it "becomes aware" that a customer has originated a restricted

[24] 72 Fed.Reg. at 56686.

transaction as ACH debit transactions or if as a RDFI it "becomes aware" that the customer has received restricted transactions as ACH credit transactions.

In contrast to this "becomes aware" standard, the Proposal in that same section uses the "is found to have received" standard with regard to a foreign bank receiving a restricted transaction from the originating gateway operator. While we address the use of multiple standards in the wire transfer context below, suffice it say that the use of a these two standards is highly ambiguous. We encourage the fostering of uniform, unambiguous standards.

F. Wire transfers. The Agencies specifically request comment on whether it is reasonably practical for an originator's bank and an intermediary bank in a wire transfer system to implement policies and procedures (including, but not limited to, those discussed above) that would likely be effective in identifying and blocking, or otherwise preventing or prohibiting, restricted transactions; whether the burden imposed by such policies and procedures on an intermediary bank, an originator, and an originator's bank would outweigh any value provided in preventing restricted transactions and a description of such burdens and benefits; and whether any policies and procedures could reasonably be limited only to consumer-initiated wire transfers, and if so, a description of any costs or benefits of so limiting the requirement. If a commenter believes that the originator's bank or an intermediary bank should not be exempted, the Agencies request that the commenter provide examples of policies and procedures reasonably designed for institutions serving in those functions to identify and block, or otherwise prevent or prohibit, restricted transactions in a wire transfer system.

Let us respond to this solicitation for comments in the order set forth above.

1. Originator's bank and intermediary bank's policies and procedures. Absent an open admission by an originator, an originator's bank may be unable as a practical matter to identify restricted transactions under any policy or procedure given the volume of wire transactions originated by such bank, particularly if that bank is a substantial regional or national enterprise. (A similar observation may be advanced with regard to an intermediary bank.) While an originator's bank may in some wire transfer transactions seek information regarding the purpose of the transfer from the originator, as a practical matter given the manner in which wire transfers may be originated and formatted remotely, this option is not available in many (if not most) instances to the originator's bank. Wire transfers may be regularly initiated by a customer by

automated means through the use of a personal computer unaided by the direct, material intervention of a financial institution.

Even if an originator's bank could secure information regarding the purpose of a wire transfer from its originator, it is not possible presently to pass on this information to an intermediary bank, given the limited number of available fields in a wire transfer information captured from the payment order by the originator's bank for forwarding to the intermediary bank. Further, even if an originator's bank had available optional fields to provide information regarding the purpose of the wire transfer to an intermediary bank, the originator's bank would need to develop a process to identify and capture such additional information in the payment order and transfer that information to the optional field in the wire transfer. This process would involve additional training and expense.

2. Burdens of policies and procedures. The burden involved in developing and implementing such policies and procedures in identifying and blocking, or otherwise preventing or prohibiting, restricted transactions appears to outweigh materially any value provided in preventing restricted transactions. The burdens set forth above include:

- The identification of restricted transactions. This identification presently cannot be performed by automated means.
- The absence of optional fields in the wire transfer available to an originator's bank to pass this identification information to an intermediary bank.
- Even if optional fields were available, the difficulty in capturing the information in the payment order and transferring this information to the wire transfer itself.

3. Limiting the policies and procedures to consumer-initiated wire transfers. We currently do not draw a distinction between wire transfers originated by consumers and wire transfers originated by businesses. This differentiation would involve a significant modification to our wire transfer system, administratively, operationally, and systemically.

G. Overblocking provisions. The Agencies request comment on the proposed approach to implementing the Act's overblocking provisions.[25] Under proposed § __.5(d), the Agencies provide:

[25] 72 Fed.Reg. at 56688.

(d) Nothing in this regulation requires or is intended to suggest that designated payment systems or participants therein must or should block or otherwise prevent or prohibit any transaction in connection with any activity that is excluded from the definition of "unlawful Internet gambling" in the Act as an intrastate transaction, an intratribal transaction, or a transaction in connection with any activity that is allowed under the Interstate Horseracing Act of 1978 (15 U.S.C. 3001 et seq.).

The language in this proposed subsection is unclear. As we read this subsection, it arguably suggests that only a qualifying intrastate or intratribal transaction or a transaction in connection with any activity permissible under the Interstate Horseracing Act of 1978 fall outside the definition of "unlawful Internet gambling." However, in reviewing the proposed definition of "unlawful Internet gambling,"[26] such unlawful gambling also includes all betting and wagering that is unlawful under any applicable federal or state law. Indeed, in the commentary to the proposed definition, qualifying intrastate and intratribal transactions or a transaction in connection with any activity permissible under the Interstate Horseracing Act of 1978 are referenced as examples of transactions falling outside of "unlawful Internet gambling."[27] At the very least, we urge the Agencies to conform § __.5(d) to the definition of "unlawful Internet gambling" so that qualifying intrastate and intratribal transactions and a transaction in connection with any activity permissible under the Interstate Horseracing Act of 1978 are not the exclusive, complete population of transactions falling outside of "unlawful Internet gambling."

We redraw this subsection as follows, as a suggestion in light of the foregoing:

(d) Nothing in this regulation requires or is intended to suggest that designated payment systems or participants therein must or should block or otherwise prevent or prohibit any transaction in connection with any activity that is excluded from the definition of "unlawful Internet gambling" in the Act, including, but not limited to, an intrastate transaction, an intratribal transaction, or a transaction in connection with any activity that is allowed under the Interstate Horseracing Act of 1978 (15 U.S.C. 3001 et seq.).

H. Reasonably designed policies and procedures. While the Agencies did not seek comment directly on the reasonably designed policies and procedures, we offer this observation.

[26] § __.2(t).
[27] 72 Fed.Reg. at 56688.

Under reasonably designed policies and procedures, the Proposal requires a participant's policies and procedures to indicate what it will do if it "becomes aware" that a customer has conducted a restricted transaction through the participant.[28] But the Proposal is unclear at exactly what point a participant will be deemed to "become aware" of such activity. This phrase is particularly confusing in light of the ambiguity surrounding what will constitute a restricted transaction. As the Agencies have noted in the Proposal, the legal analysis for this determination entails interpreting various federal and state gambling laws, which could be further complicated by the fact that whether a transaction is legal or illegal may turn, in part, upon the location of the gambler at the time of the transaction and the location where the bet or wager was made or received.[29] The Proposal also makes note of the disagreement between the U.S. Department of Justice and the horse racing industry as to what constitutes illegal gambling under the Interstate Horseracing Act of 1978. In light of all of this uncertainty, is a mere suspicion of a restricted transaction sufficient to trigger the requisite awareness and, if so, is the expectation that a participant will take certain actions on the basis of a mere suspicion consistent with the Congressional mandate that the agencies ensure that transactions associated with any activity excluded from the Act's definition of "unlawful Internet gambling" are not blocked or otherwise prevented or prohibited by the prescribed final regulations? It is important that the standard be clearly established so that financial institutions and their examiners have a consistent understanding of the standard.

Further to the "becomes aware" standard discussed herein, we also observe that in the ACH,[30] check collection,[31] and wire transfer context [32] (as noted in this letter above and below in other sections of this comment letter) this standard is used along with a "is found to have received" or "is found to have sent (as to checks)" standard. Needless to say, the employment of these multiple standards is highly ambiguous to financial institutions.

I. Due diligence. The Agencies request comment as to the appropriateness of participants incorporating into their existing account-opening procedures the due diligence provisions of the

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[28] 72 Fed.Reg. at 56698.
[29] 72 Fed.Reg. at 56681-56682.
[30] Compare § __.6(b)(1)(ii) with § __.6(b)(3).
[31] Compare § __.6(d)(1)(ii) with § __.6(d)(2)(ii).
[32] Compare § __.6(f)(1)(ii) with § __.6(f)(2).

Proposal. The Agencies also request comment on whether, and to what extent, the Proposal's examples of due diligence methods should explicitly include periodic confirmation by the participants of the nature of their customer's business.[33]

In the proposed regulations, as examples of policies and procedures in compliance with the requirements of the Act, such policies and procedures appear to apply a special emphasis on conducting due diligence to ensure that a customer will not conduct restricted transactions.[34] This mandated due diligence is to include screening potential customers to ascertain the nature and scope of their business, but the proposed regulations are unclear as to what a participant is to do with the information it obtains about a customer's business. Since not all gaming involves illegal gambling and since uncertainty surrounds what may or may not be a restricted transaction, it is not at all clear what a participant is expected to do with the due diligence information it collects. Is there some point at which there is an expectation that due diligence will be required to be increased to some form of enhanced due diligence subsequent to the gathering of initial information of a customer's business activities by a participant? Is there some information that will result in an expectation that a participant will be required to do some level of monitoring notwithstanding the fact that the commentary seems to indicate that monitoring does not apply to a number of designated payment systems? It is important that the standard be clearly established so that financial institutions and their examiners have a consistent understanding of the standard.

J. Remedial action. The Agencies request comment on the appropriateness of the Proposal's examples of participant's procedures upon determining that a customer is engaging in restricted transactions through the customer relationship, and whether any additional such procedures should be included as examples.[35]

We are troubled by the assessment of fines as remedies under policies and procedures that are deemed to be reasonably designed to prevent or prohibit restricted transactions.[36] Indeed, we are not aware of any other federal regulation where we undertake to assess fines in light of a customer engaging in apparent restricted transactions. Even if we provide that such fines may be assessed under terms in account agreements, generally, as a matter of contract law, parties are

[33] 72 Fed.Reg. at 56688.
[34] 72 Fed.Reg. at 56698-56699.
[35] 72 Fed.Reg. at 56689.
[36] See §§ __.6(b)(1)(ii)(A) [ACH system examples] and __.6(c)(3)(i) [card system examples].

unable to agree to the assessments of fines and penalties, unless it is impractical or extremely difficult to fix the actual damages.[37] Indeed, the Act itself does not expressly require the assessment of fines by participants as a remedy.

An additional question not squarely addressed in the Proposal is the disposition of such fines, upon assessment by the financial institution. May the financial institution assessing such fines treat such fines as miscellaneous income? If a financial institution were to treat such fines as income, a conflict of interest may arise if that institution views the fines as a revenue source. Does the financial institution have an obligation to treat such fines in some other manner, as dictated by accounting rules? We strongly oppose our having by regulation to assume a virtually quasi-governmental role.

K. Monitoring. The Agencies request comment on whether ongoing monitoring and testing should be included within the examples for ACH, check collection, and wire transfer systems, and, if so, how such functionality could reasonably be incorporated into those systems.[38]

Firstly, as to card systems, Wells Fargo objects to the obligation to monitor transactions as to card systems when this obligation is invoked as to existing customers.[39] This obligation should only apply as to new customers subsequent to the effective date of the final regulations. We ought also not to have any such obligation as to previously posted transaction prior to the effective date of the final regulations. The review of previously posted transactions would be unduly burdensome, especially if such review involves a significant retrospective period.

We object to any monitoring obligation as to ACH systems, check collection systems, and wire transfer systems. The significant number of these transactions occurring on a daily basis would make this undertaking significantly difficult. Further, these transactions are difficult to differentiate and identify by automated means, at least in the present state of the art. We have no available merchant or transaction codes to assist in the identification of transactions by automated means.

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[37] *United Savings & Loan Assn. of California* v. *Reeder Develop. Corp.*(1976) 57 C.A.3d 282; *City of Vernon* v. *Southern California Edison Company* (1961) 191 C.A.2d 378.
[38] 72 Fed.Reg. at 56689.
[39] § __.6(c)(2)(ii).

By way of amplification, let us take the case of monitoring wire transfer transactions. Monitoring and testing wire transfers are not currently included in the wire transfer system. We do not have currently a system to analyze patterns of payments. Because Fedwire, SWIFT, and CHIPS's wire transfer formats do not have available fields to designate transaction or merchant codes, ongoing monitoring or testing by automated means is not feasible. Even if such formats could be modified, our experience is that changes to the Fedwire and SWIFT format can take a considerable amount of time; in the case of SWIFT, the change to a format can take as long as two years. Further, once a change to a format is adopted, third party wire transfer application vendors must adopt these changes. Originator's banks and intermediary banks must then follow with appropriate changes to their wire transfer systems.

L. Merchant/business category codes and transaction codes. The Agencies suggest that in some cases it may be reasonably practical for card systems to develop merchant category codes ("MCC") for particular types of lawful Internet gambling transactions. The Agencies specifically seek comment on the practicality, effectiveness, and cost of developing such additional merchant codes.[40]

While merchant acquirers currently may employ MCCs, e.g., "gambling," and electronic commerce indicators, e.g., "Internet," to block by automated means Internet gambling transactions, such MCC identifiers are as to gambling operators generally, not as to those operating unlawful Internet gambling operations, as opposed to lawful Internet gambling operations. For example, as a matter of business decision, we currently do not establish a merchant relationship as a merchant acquirer where the MCC would be "gambling." Even if we were to establish such a relationship, as a practical matter, our blocking system would be unable to identify and differentiate unlawful gambling transactions, as opposed to lawful gambling transactions. Further, as discussed above, even if we could employ automation to differentiate between lawful and unlawful Internet gambling transactions, we would confront great difficulty in differentiating between lawful and unlawful gambling transactions and merchants engaged in such transactions (as discussed above).

Further, even if we could identify those card merchants engaged in unlawful Internet gambling operations and we could block restricted transactions by automated means, they could

contrive methods to secure payment outside of our coverage. For example, a merchant could at its Website provide links to other gateways to secure payment outside of its principal Website. In addition, if a retail merchant were to submit Internet gambling transactions through its physical payment terminal as a non-face-to-face payment transaction, we could not identify that transaction as an online gambling transaction. These activities by merchants outside of our regular, anticipated payment portals would be virtually impossible to detect.

M. Blocking within other payment systems. The Proposal does not include specific methods for identifying and blocking restricted transactions as they are under processing within the examples of procedures for any designated payment systems other than card systems because the Agencies believe that only the card systems have the necessary capabilities and process in place. The Agencies request comment on whether the procedural examples for other designated payment systems should encompass identifying and blocking restricted transactions as they are under processing, and, if so, how such functionality could reasonably be incorporated into the systems.[41]

This inquiry has been addressed through responses in other sections of this letter. However, needless to say, we observe that other than perhaps the card systems no other payment systems have the present capacity systemically to identify and block restricted transactions. Further, we are not sanguine about the development of such functionality within such payment systems, particularly when the identification of restricted transactions, even through operator intervention, is extremely challenging.

N. Cross border arrangements. The Agencies recognize that the issue of the extent of a bank's responsibility to have knowledge of its respondent banks' customers is a difficult one, which also arises in the context of managing money laundering and other risks that may be associated with correspondent banking operations. The Agencies specifically request comment on the likely effectiveness and burden on the Proposal's due diligence and remedial action provisions for cross-border arrangements, and whether alternative approaches would increase effectiveness with the same or less burden.[42]

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[40] 72 Fed.Reg. at 56689.
[41] 72 Fed.Reg. at 56689.
[42] 72 Fed.Reg. at 56690.

Specifically with regard to cross border wire transfers, we have the following question with regard to proposed § __.6(f)(2) providing:

> (2) An originator's bank or intermediary bank that sends or credits[43] a wire transfer transaction directly to a foreign bank is deemed to have policies and procedures reasonably designed to identify and block, or otherwise prevent or prohibit restricted transactions, if the policies and procedures include procedures to be followed with respect to a foreign bank that is found to have received from the originator's bank or intermediary bank wire transfer that are restricted transactions, which may address—
>
> (i) When wire transfer services for the foreign bank should be denied; and
>
> (ii) The circumstances under which the correspondent account should be closed.[44]

This proposed subsection appears merely to require an originator's bank or intermediary bank sending a wire transfer directly to a foreign bank to have policies and procedures to address instances when a foreign bank actually receives from the originator's bank or intermediary bank a wire transfer that are restricted transactions. The sanction effect of that discovery could involve a denial of future wire transfer services or, in more severe cases, a closure of the correspondent account of that foreign bank. Please confirm our reading of this subsection.

Additionally, we are unclear by the use of the phrase "is found to have received" as a standard in the subsection set forth above. Is the "is found to have received" standard of identification of restricted transactions different from the "becomes aware of" standard applicable to a beneficiary's bank?[45] If these standards are virtually synonymous, why did the Agencies elect to have these apparently differing standards?

We recommend that the Agencies endeavor to achieve the following through the final regulations:

- The same standard ought to apply to beneficiary's bank, originator's bank, and intermediary banks.
- The standard ought to be "actual knowledge."

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[43] We are unclear by the use of this term "credits." Does this term differ from the term "sends?" If both "sends" and "credits" are synonymous, what is the reason for the use of two terms? If the terms are synonymous, we suggest striking "credits."

[44] 72 Fed.Reg. 56699.

[45] See proposed § __.6(f)(ii), 72 Fed.Reg. 56699.

- A financial institution only has actual knowledge of a fact regarding a restricted transaction when that fact is brought to the attention of an officer in that institution who is responsible for that transaction, including the institution's specific compliance obligation with respect thereto.

O. List of unlawful Internet businesses. The Agencies request comment on whether establishment and maintenance of a prohibited list by the Agencies are appropriate, and whether examining or accessing such a list should be included in the final regulation's examples of policies and procedures reasonably designed to identify and block, or otherwise prevent or prohibit, restricted transactions. The Agencies also request comment on whether, if it were practical to establish a fairly comprehensive list and a participant routinely checked the list to make sure the indicated payee of each transaction the participant processed on a particular designated payment system is not on the list, the participant should be deemed to have, without taking any other action, policies and procedures reasonably designed to prevent or prohibit restricted transactions with respect to that designated payment system. Similarly, the Agencies also request comment on whether, if such a list were established and a participant routinely checked the list to make sure a prospective commercial customer was not included on the list (as well as periodically screening existing commercial customers), the participant should be deemed to have, without taking any other action, policies and procedures reasonably designed to prevent or prohibit restricted transactions. Finally, assuming such a list were established and became available to all participants in the designated payment systems, the Agencies request comment on the extent to which the exemptions provided in § __.4 of the proposed regulations should be narrowed.

Any commenter believing that such a list should be included in the final regulation's examples of policies and procedures is requested to address the issues discussed above regarding establishing, maintaining, updating, and using such a list. The Agencies also request comment on any other practical or operational aspects of establishing, maintaining, updating, and using such a list. Finally, the Agencies request comment on whether relying on such a list would be an

effective means of carrying out the purposes of the Act, if unlawful Internet gambling businesses can change their corporate names with relative ease.[46]

While we appreciate the value of a prohibited list that the Agencies may establish and maintain, we also understand that this undertaking may be extremely difficult. Consequently, we suggest at least two mitigation matters for the Agencies consideration:

- Define the term "unlawful Internet gambling" with greater precision and clarity so that impacted financial institutions may be able to identify restricted transactions with greater regularity and frequency.
- If such a definition may not be drawn by the Agencies, expand and broaden the exemptions set forth in proposed § __.4 to include all participants in the ACH system, the check collection system, and the wire transfer system.

If the Agencies are unable to provide a clearer definition of the term "unlawful Internet gambling" and if the Agencies have no appetite to exclude the ACH system, the check collection system, and the wire transfer system from coverage under the Proposal, we believe that the Agencies ought to consider issuing a government generated list in some form, even if the list may have limited effect.

In order to compile a list of businesses engaged in unlawful Internet gambling, we are mindful that one of the Agencies or other government body (such as FinCEN) would have to assume the responsibility of interpreting the various federal and state gambling laws in order to determine whether the business activities of each business appearing to conduct some type of gambling-related functions are unlawful under those laws. These interpretations will regularly require updating as the various laws change from time to time.

Further, the Agencies or other government body should grant appropriate and reasonable due process to avoid inflicting undue harm to lawful businesses by incorrectly including them on the list without adequate review. The high standards needed to establish and maintain such a list likely would make compiling such a list time-consuming and perhaps under-inclusive. To the extent that Internet gambling businesses can change the names they use to receive payments with relative ease and speed, such a list may also be outdated quickly. It is understood that although any list created may fail to identify small unlawful Internet gaming Websites, the list may offer a

[46] 72 Fed.Reg. at 56690-56691.

useful method to assist in identifying the major unlawful Internet gambling operations. The creation and maintenance of a list of unlawful Internet gambling businesses would allow financial institutions to achieve the goals of the Act without unduly burdening the financial community.

When a financial institution scrubs the prospective customer against that government list in accordance with its policies and procedures issued under § __.6, that financial institution should be deemed to have policies and procedures reasonably issued to identify and block, or otherwise prevent or prohibit, restricted transactions.

In any event, the Agencies should recognize that no private entity is in any position to compile a list, and they should make it clear in the final regulations or in the accompanying commentary that neither the Act nor the regulations require payment systems or their participants to compile a list of businesses that engage in unlawful Internet gambling, and that no regulatory or law enforcement action will be taken against a payment system or participant of a payment system solely on the basis of its not having or using such a list.

III. Wells Fargo's general comments. Wells Fargo offers the following comments generally to the Proposal.

A. Money transmitting business. With regard to the money transmitting business, we believe that this business raise unique issues under the Proposal, as follows:

- The definition of a "money transmitting business" is set forth in 31 U.S.C. § 5330(d), without reference to any regulations prescribed by the Secretary of the Treasury. Money transmitting businesses are defined to include persons who cash checks.[47] The U.S. Treasury regulations issued under the Bank Secrecy Act (the "BSA") limit the definition of check cashers by excluding from the definition persons who do not cash checks in amounts greater than $1,000.00.[48] By failing unfortunately to include any reference to the regulations issued under the BSA, under the Proposal as a possible unintended consequence any retail business that cashes any check for a customer for any amount becomes a money transmitting business. Since "restricted transactions" include funds transmitted through a money services business and, since the policies and

[47] 31 U.S.C. § 5330(d)(1)(A).
[48] 31 C.F.R. § 103.11(uu)(2).

procedures that need to be developed are required to identify and block, or otherwise prevent or prohibit, restricted transactions, it is unclear whether the policies and procedures mandated under the proposed regulations would be required to consider all businesses that fit within the definition of a money transmitting business, including retailers who may cash small-dollar checks from time to time for their customers.

- The discrepancy between the definition of a money transmitting business for purposes of the BSA regulations and the unlawful Internet gambling Proposal is likely to complicate the policies and procedures that financial institutions develop to deal with this class of customers.
- Unlike other designated payment systems, no participant in a money transmitting business is exempt from the Proposal. A money transmitting business will frequently use another designated payment system in the middle of a transaction. For example, Western Union may move funds from one of its facilities to another of its facilities by means of a wire transfer. In such instances, are financial institutions that are intermediaries in a transfer of funds covered by the exemptions applicable to wire transfers or are they considered participants in overriding money transmitting business activity. We suspect that the Agencies intend to exclude the intermediate wire transfer activity from coverage, but this ambiguity should be clarified.

IV. Conclusion. Wells Fargo wishes to express its appreciation for the opportunity to offer its comments to the Proposal. If you have any questions to the foregoing, please do not hesitate to contact us.

Sincerely,

Ted Teruo Kitada
Senior Company Counsel

cc: Linda A. Leo
Craig D. Litsey
Kenneth J. Bonneville, Jr.